No. 407.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY,
Appellant.

vs.

MYLES P. O'CONNOR et al.,
Appellees.

Brief for Appellees.

OLNEY & OLNEY,
DUDLEY & BUCK,
Solicitor for Appellees.

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BERNARD McGORRAY, *Appellant,* vs. MYLES P. O'CONNOR ET AL., *Appellees.*	No. 407.

BRIEF FOR APPELLEES.

Bernard McGorray, claiming to be a citizen of the State of Illinois, filed in the Circuit Court of the Northern District of California, a bill in equity against M. P. O'Connor and the other respondents, wherein he claimed that a certain sheriff's deed which O'Connor had received from the defendant Cunningham was void, and prayed that it be ordered cancelled, and that plaintiff be allowed to redeem the premises conveyed by the deed. The respondents interposed demurrers which were overruled. Defendant O'Connor thereupon filed his separate answer, and the other defendants united in a joint answer.

O'Connor's answer was filed March 26, 1896 (p. 46). The answer of the other defendants was filed March 30, 1896 (p. 63).

Thereupon the complainant filed his replication to both these answers. This replication was filed April 1, 1896 (pp. 63, 64, 66). The bill of complaint did not waive an answer under oath (p. 13–77). The case being at issue the complainant had three months under rule 69 for taking his testimony, and this time expired July 1, 1896. If a so-called bill of exceptions is left out of consideration, it appears from the record that the next thing done was that all parties submitted the cause on bill and answer to the court for decision, and that on April 12, 1897, the court adjudged that the plaintiff was entitled to no relief, and his bill of complaint dismissed. (See pp. 66, 67, 68.)

The appellant (plaintiff in the court below) has attempted an innovation in equity practice by presenting to the judge and getting him to settle a bill of exceptions.

We presume that this is the first instance known of a bill of exceptions in equity practice.

On appeal to this Court from the Circuit Court in an equity case, the practice is, as it has been from time immemorial in this country and England, that the entire record goes up. A bill of exceptions is only known in actions at law. The Supreme Court of the United States has gone so far as to say that, where a jury has been called in to try issues in an equity case, "a bill of excep- " tions, as such, has no proper place in the proceeding," but the original records must be used by the Court in deciding whether a new trial shall be granted.

Watt v. *Starke*, 101 U. S. 247;

Beach's Modern Equity Practice, Secs. 667, 671.

Therefore this Court has not before it any record which it can consider showing that motions were made to strike out portions of the answer, and the action of the Circuit Judge thereon.

But it matters little whether a bill of exceptions is permissible or not. We do not object to the Court considering any document in the transcript, even though it only appears because copied in a bill of exceptions. We do object, however, to this Court considering statements purporting to be contained in the so-called bill of exceptions, such as is found at page 92, latter part of 93, latter part of 94, pages 99, 100. We repeat that we do not object to this Court considering the documents constituting the record, but we do seriously object to what purports to be statements of fact contained in the bill of exceptions.

From these documents, and also from Judge Morrow's opinion (p. 77), it appears that two days before the complainant's time to take testimony had expired, and long after the issues were settled by his filing a replication to the answers of the defendants, he made a motion to strike out parts of the answers. What portions of the answers the complainant objected to cannot be made out from the record.

Judge Morrow in his opinion refers to this motion and says (p. 77):

"This motion has since been considered and denied, "not only because it had not been made at the proper "stage of the proceedings, but for the reason that the "allegations proposed to be struck out were responsive to "the allegations of the bill."

The order of the court denying the motion is at page 90.

There was also a motion made to strike the answers from the files, because not containing the certificate of counsel required when a special plea or answer is interposed.

That motion was evidently made because counsel did not distinguish between an answer to the merits and a plea or special answer.

We now take up the facts as they appear from the pleadings.

On the 30th of October, 1882, C. K. Bailey and C. W. Carpenter were general partners in farming and stock raising in San Joaquin County, California, under the name of Bailey & Carpenter (pp. 29, 39, 2).

A part of the partnership assets was a tract of land known as the "Bailey & Carpenter Home Place" (pp. 5, 6, 39, 40), and on said date the said "*firm*" gave a mortgage to M. P. O'Connor on said Home Place to secure the payment of $10,000 (pp. 5, 6, 39, 40).

After the execution of this mortgage by the partnership, C. W. Carpenter died. His death was June 22, 1884. He left a will, by which he gave the bulk of his estate to the children of his surviving partner, and appointed said surviving partner, C. K. Bailey, his executor. This will was admitted to probate February 23, 1884 (pp. 2, 29) and Letters Testamentary issued to Bailey. The heirs at law of the deceased partner were his brothers, and among them one Clinton H. Carpenter (pp. 3, 30).

Within one year after the will was admitted to probate these brothers instituted a contest of the will. There

were two trials of the issues over the will, both resulting in a verdict for contestants, but both verdicts were set aside by the Supreme Court of the State, and the contest is still pending, Bailey, of course, continuing to act as executor. On the 24th of May, 1893 (the bill of complaint is in error as to date), an agreement was made between the proponents of the will and the contestants to submit their differences to arbitration. This agreement is set out in full in the answer, commencing with page 31. This agreement was entered in the proceedings in Court in the matter of the estate. It provided that the arbitrator should fix and determine "what, under the "circumstances of the case, is a reasonable, just and "equitable amount or portion of the said estate to be "set over to such contestants in full of all claims of "each and every of them" (p. 32). It further provided that the referee should fix the values of the land, and that the proponent should have five days to decide whether to pay the sums fixed by the referee as the contestants' interest in the estate, or to convey lands at the value fixed by the referee. *But it was specially provided that no portion of the land covered by the mortgage to O'Connor (the Home Place) should be conveyed to the contestants.* Under the agreement, the matter was submitted to the arbitrator, and he filed in Court his award. It commences with page 37. The arbitrator found the net value of the estate to be $22,513.50, and fixed the value of contestant's interest to be $11.256.75, or one-half. He also appraised certain parcels of land in order that the lands might be conveyed to contestants, if the proponent so elected to do. But, as a matter of

course under the agreement, he left the property in controversy here, viz. the Home Place, to go, not to the contestants, but to the proponents of the will.

This award is still in full force and effect (pp. 5, 39). By it the said Clinton H. Carpenter, the contestant, and under whom plaintiff claims, lost all interest, if he ever had any, in the Home Place. That he never had any such interest as gives him the right of redemption, fully appears from Judge Morrow's decision.

It is alleged in the complaint and admitted by the answer, that the estate of Carpenter has never been distributed nor separated from the assets of Bailey and Carpenter, but that Bailey still continues to carry on the partnership business (pp. 10, 43).

The denials of the answer are very sweeping that the property covered by the mortgage to O'Connor were ever any part of the estate of the deceased C. W. Carpenter (p. 40), but the defendants admit that said land was a portion of the partnership assets of the firm of Bailey & Carpenter.

Meanwhile, and before the arbitration agreement, O'Connor brought suit to foreclose his mortgage (p. 40). In this suit he made C. K. Bailey as an individual, also as executor, also as surviving partner of the firm of Bailey & Carpenter, defendant. He also made certain of the heirs and legatees of the deceased C. W. Carpenter parties defendant, and among others the said Clinton H. Carpenter; but he alleges (p. 40) that none of these parties are or were necessary or proper parties, and the only purpose of doing so was purely precautionary. He also alleges that the Superior Court of San Joaquin County

duly gave and made a judgment foreclosing said mortgage as against C. K. Bailey as an individual, against C. K. Bailey as executor of the will of C. W. Carpenter, and against C. K. Bailey as surviving partner of the firm of Bailey & Carpenter, and that no judgment was entered against Clinton H. Carpenter except to cut off any supposed right of redemption the last named person might have (p. 41).

He also alleges that no personal judgment whatever was taken against any one except the defendant Bailey (p. 41).

This judgment was rendered March 15, 1890 (pp. 6–40). Under this judgment the property was sold by the defendant, Cunningham, as sheriff, and M. P. O'Connor became the purchaser. There being no redemption, and likewise there being no offer to redeem by a qualified redemptioner within the statutory time, the defendant, Cunningham, as sheriff, executed to the defendant, O'Connor, a sheriff's deed.

After the sale, and before the execution of a sheriff's deed, Amos H. Carpenter obtained a judgment against his brother, Clinton H. Carpenter, for a large sum of money (p. 7), and it is pretended that this judgment was assigned to plaintiff (p. 7), but that is denied (pp. 42, 43). As no proof was offered to sustain the allegation of the Complaint, this fact absolutely essential to any recovery by plaintiff, is not only unproven, but the denials must be taken as true. This one thing ends the case right here. If Clinton H. Carpenter had a right to redeem, which we deny, it does not appear that his right has passed to plaintiff. We submit that no further discussion is necessary. (See denials and allegations at pp. 42 and 43.)

Claiming to be the assignee of a creditor of Clinton H. Carpenter, who was one of the heirs of the deceased C. W. Carpenter, the plaintiff claimed the right (purely a statutory right) to redeem from the sale. His right to redeem was denied, and he brings this suit. The denials contained in the answer of O'Connor at pages 43, 44, and 45, negative all ancillary matters tending to show a cause of action in plaintiff.

The answer of the other defendants is substantially the same as the answer of the defendant, O'Connor (pp. 47–62).

We respectfully submit that no further argument is necessary. The denials of the answer must be taken as true, and they show that plaintiff is not entitled to relief. Judge Morrow's opinion states the law as we understand it in California. We desire only to add that, under the system in vogue in this State, heirs and legatees are not necessary parties to foreclosure proceedings where the mortgagor has died. It is only his executor or administrator who should be made a party.

Bayley v. *Muehe*, 65 Cal. 345;
Monterey Co. v. *Cushing*, 83 Cal. 507;
Collins v. *Scott*, 100 Cal. at p. 452.

The last named case was like this, that heirs had been made parties and afterwards brought suit to redeem. The Court said: "Whether or not they were made parties "defendant in that action is of no moment."

In addition to the authorities from California cited by Judge Morrow to the effect the heirs of a deceased part-

ner have no specific interest in any specific portion of the partnership assets whether of personalty or realty, we cite

Babcock v. *Bates*, 95 Cal. at p. 487;
Smith v. *Walber*, 38 Cal. 388.

It nowhere appears in this case how the record title to the land in controversy stood. All that appears is that is was partnership property. Such being the case Bailey as surviving partner took the title to the property. He was, until his title was divested by foreclosure, the sole owner, with a duty upon his part to account to the estate (not the heirs) of his deceased partner for his actions in regard to such property.

No heir of a deceased partner can sue the surviving partner. There must first be an executor or administrator appointed, and he alone can call the surviving partner to account.

This question is fully settled in *Robertson* v. *Burrell*, 110 Cal. 568, cited by Judge Morrow.

If Mr. Bailey has been derelict in his duty, he may be reached by proper proceedings, but to claim that an heir has a lien of any kind upon any specific portion of the partnership assets is a manifest absurdity.

Besides, how can plaintiff avoid the arbitration agreement and the award of the arbitrator? He alleges this award is in full force and effect, and seems to base his claim to relief upon the ground that the award gives his alleged predecessor, Clinton H. Carpenter, an interest in the property of the estate. But this agreement and the award expressly except the tract of land in dispute from any claim on behalf of the heirs of the deceased partner. In effect it awards the tract of land to other parties. Is

there any answer to this proposition? Whatever interest Clinton H. Carpenter may have had in the deceased partner's interest in the partnership property has, by his own agreement, and the award under the agreement, become limited to certain portions of the property to the exclusion of the land in dispute.

It must not be lost sight of that C. H. Carpenter was cut off by the judgment of foreclosure from any right to redeem as heir of the deceased. (See p. 41.) What plaintiff claims is that he is a redemptioner under the statute, because his alleged predecessor, C. H. Carpenter, was a judgment debtor. That has been the basis of his contention. But the answer negatives the allegations of the complaint in that regard.

There has been confusion in the mind of complainant's counsel all the time as to the right of a party to redeem from a mortgage, and the right to redeem from a sheriff's sale. The last is a purely statutory right. The first is an equitable right enforced by courts of equity, and to cut it off, foreclosure is necessary. This equitable right of C. H. Carpenter, as heir of the deceased, was cut off by the judgment. (We deny that as heir he had any such right.) Now when plaintiff claims under the statute he must claim as a judgment debtor, or as the successor in interest of a judgment debtor.

There are so many manifest and conclusive answers to the plaintiff's contention, that we respectfully submit his appeal is entirely without merit.

Messsr. Dudley & Buck have asked up to represent their clients, and therefore we sign ourselves.

OLNEY & OLNEY,
Solicitors for Defendants.